Haas, correctly held that no evidence of "actual prejudice" or of a direct financial interest in the "outcome" of a case is required for a showing of a financial interest in violation of due process.

Respondents' claim (page 19) that in *Yaqub* and *Haas,* "unilateral selection, not payment, was the deciding factor" is false. *Haas* states: "The practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed" did not satisfy the requirements of due process . . ." And *Yaqub* quoting *Haas, supra* at 1017, states: "The Court's inquiry is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge.'"

In the instant case, in *addition* to the fact that Respondents paid the Arbitrator's fee 100 percent for the entire 32 session-hearing spanning 2 1/2 years, *making the Arbitrator's financial interest "direct, substantial and pecuniary"*, Respondents had chosen an Arbitrator (Daniel Willick) whose career specialty was that of an attorney who represents hospitals in peer review hearings. (See Petitioner's Writ of Certiorari p. 14 and Appendix A-35-A-46.) This *compounded* the Arbitrator's financial interest in the proceeding. These types of hearings would be characterized as the Arbitrator's "bread and butter" under *Brown v. Vance* (5th Cir. 1981) 637 F.2d 272, 276, thereby creating a further temptation to the Arbitrator "to enhance his income" by leaning in the direction of his Hospital clients.

V. Petitioner's Request for Relief from Hospital Peer Review Action is Reasonable and Based Upon Facts.

Respondents' Opposition Brief (page 20) states:

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which Petitioner placed before the Appellate and California Supreme Court. Furthermore, at the time Petitioner brought this case to the California Supreme Court, *Yaqub* had become final law. Contrary to Respondents' claim (p.18, fn. 5), Petitioner fully argued the Arbitrator's financial interest bias in briefs (Appendix A-68; A-70) and at trial.

> "Petitioner never objected to the selection of the arbitrator, or that Respondent paid the arbitrator's fee, until after he had lost the arbitration. Had Petitioner believed that the selection[3] and payment was procedurally unfair, he should have voiced his before the conclusion of an arbitration...His failure to do so should result in his argument being waived."

This argument is invalid. As a matter of law, Respondent is estopped from imposing any waiver upon Petitioner for a condition known to Respondents, the knowledge of which Respondents denied to Petitioner. Indeed, Petitioner relied on the notion of fair play and full disclosure rules to trust that Respondent would not select an overtly biased arbitrator. It was not until the conclusion of the Arbitration that it became apparent that the Arbitrator had been biased by the fee arrangement and by his own interest in his career specialty of representing hospitals in peer review hearings. It was only upon receipt of the Arbitrator's Findings that Petitioner discovered that the Arbitrator had ignored all of the independent expert witnesses with supporting exhibits, who, *like the California Medical Board*, had found Petitioner to be within the community standard of care in all of the cases charged against him. (See Appendix B-10; B-11.)

Respondents could not misstate the truth more when they allege that "the Arbitrator's fees were not dependent on the arbitration's outcome." (Page 16) In fact, the Arbitrator (Daniel

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[3] On page 20 Respondents claim the Arbitrator was "mutually selected", but on page 19 Respondents admit they "selected" the Arbitrator. As Petitioner argued at trial and in Briefs, Respondents chose an Arbitrator who represents hospitals in peer review hearings, and paid his fee 100%. That Petitioner's attorney agreed to the Arbitrator (after telephone voir dire without Petitioner's presence [Resp.29]) is irrelevant. First, Petitioner's attorney's negligence in permitting this Arbitrator to sit does not exonerate Respondents of their guilt in choosing an arbitrator known by Respondents to be biased in favor of Hospitals. *See, e.g. Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019 (plaintiff's reliance upon mistaken conduct of his attorney does not forfeit plaintiff's rights under the law.) Second, Federal law requires disqualification of an adjudicator with a substantial pecuniary interest.

Willick's) fees for many years to come depended upon how he ruled. A ruling against Respondents would banish him from future work in his career specialty as a hearing officer who represents hospitals in peer review hearings.[4]

CONCLUSION

Indeed a veritable cornerstone of our democracy requires that no decisionmaker be permitted to financially gain by his or her own decisions. Yet, the state law as applied in this case permits that very injustice.

It is simple fact that Respondents were able to choose and pay an Arbitrator who had much to gain by ruling in Respondents favor, and did so. Petitioner was obviously abused in this process. "The unfairness that results from *biased* decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from *insufficient* procedures." *Haas, supra* at 1036. In Justice Holmes' famous phrase, "even a dog distinguishes between being stumbled over and being kicked.'" (Holmes, The Common Law (1881) p. 3.)

Federal law and the U.S. Supreme Court precedent hold that direct and substantial pecuniary interest creates a constitutionally unacceptable risk of bias.

Petitioner respectfully asks this court to grant certiorari so that such abuse against physicians and others similarly situated not be permitted under the law.

Respectfully submitted,

ROBERT JAFFE, M.D.
Petitioner in Pro Se

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[4] Time has borne this out. In the recent case *Mileikowsky, M.D. v. Tenet Healthsystem* (2005) 128 Cal.App.4th, 531, 565, the very same Arbitrator who presided over Petitioner's Hearing (Daniel Willick), was selected by Tenet Hospital to preside as hearing officer over Mileikowsky's peer review hearing and was accused of impermissible rulings in favor of his hospital client, Tenet.

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Supreme Court, U.S.
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No. 04-1536

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITION FOR REHEARING

ROBERT J. JAFFE, M.D.
22141 Burbank Boulevard, #5
Woodland Hills, CA 91367
Telephone: (818) 489-4120

Petitioner in Pro Se

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT J. JAFFE, M.D., Petitioner in pro se

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER HEALTH PLAN, INC., Respondents.

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INTRODUCTION

This case arises from the action of Respondents, Kaiser Foundation Hospital, to terminate Petitioner's hospital staff privileges despite all of the objective evidence placed before the hospital and contrary to the findings of the California Medical Board.

Petitioner is a board-certified internist. From 1977 to 1994, he was an attending physician with Kaiser Foundation Hospital, and was a partner with the hospital's affiliated Southern California Permanente Medical Group for 17 years.

In April of 1995, Respondent Kaiser Foundation Hospital began a "formal hearing" to decide whether Petitioner's medical staff privileges would be terminated. California Business & Professions Code 809, *et seq.* and Federal Law (42 U.S.C. 11112, *et seq.*), require that when licensed physicians' privileges are subject to termination, the physician is entitled to a hearing that complies with fair procedure and due process. This hearing was held before an arbitrator who acted as hearing officer, fact finder and decision-maker, *despite* the fact that the arbitrator had a direct, personal, substantial and pecuniary interest in the proceeding. Respondents, Kaiser Foundation Hospital, had chosen the arbitrator and paid the arbitrator's fee 100 percent over the entire 32-hearing sessions spanning 2 ½ years, thereby making the arbitrator's financial interest, "direct, personal substantial and pecuniary", as characterized by U.S. Supreme Court precedent.

U.S. Supreme Court precedent on this specific issue holds that a "direct, personal substantial and pecuniary interest" in a proceeding creates a bias that is too high to be constitutionally tolerable.

Indeed, the arbitrator in this matter upheld Respondents' decision to terminate Petitioner's privileges contrary to the objective independent expert testimony, supporting authoritative literature entered as exhibits, and the California Medical Board which twice affirmed that Petitioner was within the community standard of care in all the cases charged against him. (See Appendix B-10 and B-11.)

Petitioner brought the issue before the California state courts that he was denied due process of the law because the arbitrator had been biased by his financial interest.

The state courts' decisions upheld the Hospital's action to terminate Petitioner's hospital privileges, *despite* the fact that the arbitrator had a direct, substantial and pecuniary interest in the proceeding. In doing so the courts ignored U.S. Supreme Court precedent that holds that an adjudicator with a "direct, substantial and pecuniary interest" in a proceeding possesses a bias that is too high to be constitutionally tolerable, requiring disqualification of the adjudicator.

The state court decisions also ignored the Fourteenth Amendment to the U.S. Constitution that *guarantees* that no state shall deprive a citizen of liberty or property without due process of law.

The state courts have decided a federal matter in a manner that *denies* a U.S. Constitutionally-guaranteed right and in a manner that directly conflicts with U.S. Supreme Court precedent.

QUESTION PRESENTED FOR REHEARING

If state courts decide a federal issue in a manner that denies a U.S. Constitutionally-guaranteed right and in a manner that *conflicts directly* with U.S. Supreme Court precedent on the specific issue at hand, will the guarantees of the U.S. Constitution and the U.S. Supreme Court precedent then *control*?

JURISDICTION

Petitioner's Petition for Rehearing is proper per Rule 44 of the U.S. Supreme Court Rules in that the grounds for this Petition for Rehearing are limited to circumstances of substantial "controlling effect not previously presented". This Petition is based on the controlling effect of the U.S. Constitution on the issue at hand, and the controlling effect of the U.S. Supreme Court's precedent on the issue at hand. The U.S. Constitution and U.S. Supreme Court precedent must control over the state courts' contrary decisions.

STATE COURTS MAY NOT DENY CITIZENS THEIR U.S. CONSTITUTIONALLY GUARANTEED RIGHTS

State courts have no discretion to deny citizens' rights guaranteed under the U.S. Constitution. All judges take an oath to uphold the U.S. Constitution and are bound to abide by it. Article VI of the U.S. Constitution, the "Supremacy Clause" states: "This *Constitution*, and the *Laws of the United States* ... shall be the *supreme Law of the Land*; and the *Judges in every State shall be bound thereby*..." (Emphasis added.)

The Fourteenth Amendment to the U.S. Constitution guarantees the right to *due process* before a state can take away a citizen's property or liberty.

U.S. SUPREME COURT PRECEDENT CONTROLS OVER ISSUES OF FEDERAL LAW.

On an issue of *federal law*, a state court is *bound* by the decisions of the United States Supreme Court. The decisions of the United States Supreme Court are the final authority of precedent on issues of federal law. The decisions of the United States Supreme Court on federal law issues are binding precedent on all courts throughout the country, both state and federal.

The issue Petitioner placed before the state courts and the U.S. Supreme Court is an issue of *federal law* because it involves a U.S. Constitutionally-guaranteed right, *due process*.

State courts are *not* free to ignore U.S. Supreme Court precedent on federal law issues. Indeed, as to U.S. Supreme Court precedent, "[u]nless we wish anarchy to prevail within the federal judicial system, a precedent of this court must be followed . . ." *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982).

In *Mullaney v. Wilbur*, 421 U.S. 684, 689, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the U.S. Supreme Court quoted a federal appellate court's ruling stating "Although recognizing that 'within broad limits a state court must be the one to interpret its own laws,' the court nevertheless ruled that 'a totally unsupportable construction which leads to an invasion of constitutional due process is a *federal matter*.'" (Emphasis added.)

Additionally, if a state court is interpreting a state law *in a manner that violates federal law*, then the federal court's decisions *will* be binding. *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

Thus, the state courts in the instant matter, had no discretion, nor authority, to ignore the guarantees of the U.S. Constitution, and the U.S. Supreme Court precedent that expressly addresses the instant issue as put forth below.

FEDERAL LAW AND U.S. SUPREME COURT PRECEDENT HOLD THAT AJUDICATORS WITH A "DIRECT, SUBSTANTIAL AND PECUNIARY INTEREST" IN A PROCEEDING POSSESS A CONSTITUTIONALLY UNACCEPTABLE RISK OF BIAS.

The issue of Petitioner's Writ of Certiorari is whether the lower courts' rulings that *permit* an adjudicator with a direct, personal, substantial, and pecuniary interest to preside over a hearing affecting a physician's right to practice his profession, are in conflict with Federal law and U.S. Supreme Court precedent, and repugnant to the Constitution of the United States as violating physicians' rights to impartial adjudicators pursuant to constitutional guarantees of due process and fair procedure.

The matter Petitioner brings before this Court has been considered by the California courts. The California state courts' rulings violate the U.S. Constitution and are in direct conflict with U.S. Supreme Court precedent.

The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, that no state[1] can deprive a citizen of liberty or property without due process.

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[1] See Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari, (pages 1-4) establishing that "State Action", a necessary element to invoke the Fourteenth Amendment, was present in Respondents' revocation of Petitioner's Hospital's privileges in this case, as Respondents were state actors.

The U.S. Supreme Court precedent on this issue holds that an adjudicator with a "direct, personal, substantial and pecuniary" interest in the outcome of a proceeding creates the probability of actual bias that is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-826, 106S.Ct. 1580, 89 L.Ed. 2 nd. 832 (1986), quoting *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville*, 409 U.S. 57, 60 [93 S.Ct. 80, 83].

This Court requires disqualification of adjudicators only for financial interests that it has characterized as "direct, personal, substantial, [and] pecuniary," rather than "slight." (*Aetna Life Ins. Co. v. Lavoie, supra.* 475 U.S. 813, 825-826; *Ward, supra*, 409 U.S. 57, 60 and *Tumey, supra*, 273 U.S. 510, 523.) (Emphasis added.)

The adjudicator in this matter, who decided whether Petitioner would be deprived of his property right (his hospital privileges)[2], and his liberty right[3] was paid 100 percent by the hospital over the entire 32 hearing-sessions spanning 2 ½ years. U.S. Supreme Court precedent holds that an adjudicator with such a "*direct, personal, substantial, and pecuniary interest*" in a proceeding deprives a party of due process of law and violates the Fourteenth Amendment.

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[2] See Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari (pages 4-5) where Petitioner cited *both* state and federal law holding that hospital privileges *when "already-licensed"* are a property right. (*Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)

[3] See Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari (pages 4-5) where Petitioner established that he also had a liberty interest insofar as Respondents' action seriously damaged his professional reputation and compromised his *future* employment prospects because of the required reporting to state and federal data banks and the required disclosure on all future hospital and staff employment applications. (See *Board of Regents, supra*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).)

(*Aetna Life Ins. Co. v. Lavoie, supra.* 475 U.S. 813, 825-826; *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville,* 409 U.S. 57, 60 [93 S.Ct. 80, 83]).

The California state courts' rulings ignored both the U.S. Constitutional guarantee of Due Process and the U.S. Supreme Court precedent on the issue at hand.

Contrary to U.S. Supreme Court precedent, the state courts in this matter ruled improperly that in order to prevail on a claim of bias arising from financial interest, Petitioner must show *actual* bias on the part of the arbitrator and that the financial interest must be based on the "*outcome*" of the hearing. (See Opinion Appendix B-5 and B-6).

These rulings are in *direct conflict* to U.S. Supreme Court precedent. The U.S. Supreme Court has repeatedly and unambiguously held that courts, when faced with a claim of bias arising from financial interest, do *not* require proof of a direct pecuniary interest in the "*outcome*" of a particular case, or proof of "*actual*" judicial prejudice, nor do they decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville,* 409 U.S. 57, 60 [93 S.Ct. 80, 83]), namely whether a fee system presents a '<u>possible temptation to the average man as judge to forget the burden of proof ... or which might lead him not to hold the balance nice, clear and true.</u>'" (Emphasis added.) *See also Aetna, supra,* 475 U.S. at pp. 824-825 [106 S.Ct. at pp. 1586-1587]; *Connally v. Georgia* (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 444]; and *Withrow, supra,* 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975).

The rule disqualifying adjudicators with *pecuniary interests* applies with full force to *administrative hearings*. In this context, this Court has applied the same rules to *administrative hearing officers and judges alike*. *Gibson v. Berryhill*, 411 U.S. at p. 579 [93 S.Ct. at p. 1698].) This Court has stated: "It is [Page 27 Cal.4th 1027] sufficiently clear from our cases that those with *substantial pecuniary interest* in legal proceedings should not adjudicate these disputes." (Emphasis added.) (*Gibson, supra*, 411 U.S. 564, 57.) An adjudicator with a *financial interest* in a proceeding presents a "situation[] . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow, supra*, 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975).

"A fair trial in a fair tribunal is a *basic* requirement of *due process*." *In Re: Murchison*, 349 U.S. 133 (1955). "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, *denies* the latter *due process* of law." (Emphasis added) *In Re Murchison, supra* quoting *Tumey v. Ohio*, 273 U.S. 510, 532 .] Accordingly, "No man is permitted to try cases where he has an interest in the outcome . . . " (Id.)

In addition to violating due process and conflicting with U.S. Supreme Court Precedent, the California state courts' rulings in the instant case that Petitioner must show actual bias and financial interest based on the "outcome" of the hearing in order to prevail on a claim of bias arising from financial interest, are contrary to the holding of the *Federal Court of Appeal*, Fifth Circuit. *See, e.g. Brown v. Vance*, 637 F.2d 272, 283 ("we need find no instance of actual judicial bias to hold the fee system constitutionally infirm)."
The court wrote, "the test is whether a fee system presents a 'possible temptation to the average man as judge to forget the